No. 90-574

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

MIDLAND ENTERPRISES, INC. and
ORGULF TRANSPORT COMPANY,

Petitioners,

versus

THE PILLSBURY COMPANY, ILLINOIS CENTRAL GULF RAILROAD COMPANY, BURLINGTON NORTHERN RAILROAD COMPANY, and CONAGRA, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE PILLSBURY COMPANY, ILLINOIS CENTRAL GULF RAILROAD COMPANY, BURLINGTON NORTHERN RAILROAD COMPANY, AND CONAGRA, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Correctly stated, the Petition for a Writ of Certiorari presents the following questions for review:

1. Whether the district court may properly award a plaintiff prejudgment interest under the general maritime law on the replacement cost of damaged property from the date of the casualty rather than from the date of expenditure for repairs.

2. Whether the United States Court of Appeals for the Fifth Circuit properly exercised its discretion under Rule 38 of the Federal Rules of Appellate Procedure in assessing petitioners' attorneys' fees and double costs for a frivolous appeal.

LIST OF ALL INTERESTED CORPORATE PARTIES

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, the undersigned counsel of record certifies that the following corporate entities have an interest in the outcome of this case:

1) The Pillsbury Company and its parent, GraMet Holdings, Inc.;

2) Illinois Central Railroad Company, its parent, Illinois Central Corporation, and its nonwholly-owned subsidiaries; The Belt Railway of Chicago; Mississippi Export Railroad Company; Paducah & Illinois Railroad Company; Peoria & Pekin Union Railway Company; Terminal Railroad Association of St. Louis; and Trailer Train Company;

3) Burlington Northern Railroad Company, its parent, Burlington Northern, Inc., and its nonwholly-owned subsidiaries; Davenport, Rock Island and North Western Railway Company; Keokuk Union Depot Company; Kansas City Terminal Railway Company; Trailer Train Company; The Wichita Union Terminal Railway Company; Longview Switching Company; Terminal Railroad Association of St. Louis; The Belt Railway Company of Chicago; M T Properties, Inc.; Iowa Transfer Railway Company; Burlington Northern (Manitoba) Limited; Portland Terminal Railroad Company; Paducah & Illinois Railroad Company; Denver Union Terminal Railway Company; Houston Belt & Terminal Railway Company; Camas Prairie Railway Company; and Northern Radio Limited;

LIST OF ALL INTERESTED CORPORATE PARTIES (Cont.)

4) Conagra, Inc. (no parent or nonwholly-owned subsidiaries);

5) Midland Enterprises, Inc.;

6) Orgulf Transport Company;

7) Eastern Enterprises, a Massachusetts trust.

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STATEMENT OF THE CASE

This appeal concerns a run-of-the-mill maritime collision case. Petitioners, Midland Enterprises, Inc. and Orgulf Transport Company (hereinafter collectively referred to as "Midland-Orgulf"), are the owner and operator, respectfully, of the M/V ROBERT N. STOUT, an inland towboat. Respondent, the Pillsbury Company (hereinafter referred to as "Pillsbury"), was the owner of a mooring dolphin at the Pillsbury Sauget Facility and the lessee of a mooring cell at the ICG/Peabody Facility in the St. Louis harbor. Respondents, Illinois Central Gulf Railroad Co. (hereinafter referred to "ICG") and Burlington Northern Railroad Co. (hereinafter referred to as "Burlington Northern"), are the owners of the mooring cell at the ICG/Peabody facility. Prior to the trial in the district court respondent Conagra, Inc. (hereinafter referred to as "Conagra") acquired Pillsbury's interests in the above-described cell and dolphin.

The casualty which precipitated this litigation occurred on October 28, 1986, as the M/V ROBERT N. STOUT and her tow of thirteen fully loaded, unmanned hopper barges proceeded downriver in the St. Louis harbor. As she did so the tow broke apart, due to the tow's improper rigging and the crew's neglect, and eleven barges cascaded downriver. Eventually, one or more of the barges collided with the mooring cell at the ICG/Peabody Facility, while another barge drifted further downriver and collided with the mooring dolphin at the Pillsbury Sauget Facility. Both structures suffered extensive damage. Opinion of the district court, A. 5, 9-21, 47-49, 715 F.Supp. 738, 742-747, 757-758.

Following the casualty, Pillsbury and Midland-Orgulf conducted a joint survey of the structures. Opinion of the district court, A. 21, 715 F.Supp. 738, 746-747. Because Pillsbury's surveyor concluded that the structures were not structurally sound, Pillsbury contracted with a consulting engineering firm to inspect the structures and provide recommendations concerning their replacement or repair. *Id.*, A. 23-24, 715 F.Supp. 738, 747-748. Thereafter, the consulting engineers concluded that the cell and the dolphin were irreparable and should be replaced. *Id.*, A. 39, 715 F.Supp. 738, 754. Acting upon their findings, Pillsbury directed the consulting engineers to prepare specifications and bidding instructions in order that Pillsbury could solicit a contractor to effectuate the replacements. *Id.* Following preparation of the bid package, the consulting engineers conducted a sealed bidding process. Ultimately, the consulting engineers recommended that Pillsbury accept the lowest bid. *Id.* Although Midland-Orgulf erroneously contends that Respondents have no intention of replacing the structures, the uncontroverted testimony was to the contrary. *Id.* A. 26, 715 F.Supp. 738, 749. Pillsbury has simply postponed the replacement of the structures until the conclusion of this litigation because of budgetary constraints. *Id.* Nonetheless, Pillsbury has expended $25,658 in its preliminary replacement effort for surveys, engineering services and contract administration. *Id.*, A. 40, 74-77, 715 F.Supp. 738, 754, 768-769.

On October 20, 1987, Pillsbury brought an action in admiralty against Midland-Orgulf in the United States District Court for the Eastern District of Louisiana seeking to recover the damages to its mooring structures.

Thereafter, on June 30, 1988, ICG and Burlington Northern intervened in the proceeding. Shortly prior to trial, Pillsbury sold its Grain Merchandising Division, including its interest in the Pillsbury Sauget Facility and the ICG/Peabody Facility to Conagra. As part of the sale, Conagra ratified Pillsbury's institution of the instant litigation, agreeing to be bound by its outcome and further agreeing that any sums recovered are to be retained by Pillsbury, Burlington Northern and ICG. Opinion of the District Court, A. 6-8, 715 F.Supp. 738, 741.

Following the trial of this matter on April 27-28, 1989, the district court entered judgment in favor of Pillsbury, Burlington Northern, ICG and Conagra and against Midland-Orgulf in the amount of $284,709.92, together with interest and costs. The judgment comprised the replacement cost less depreciation for both the mooring cell and the mooring dolphin as well as the expenses incurred in the preliminary replacement effort less depreciation. Prejudgment interest was awarded on these sums from the date of the casualty. Opinion of the District Court, A. 62-84, 715 F.Supp. 738, 763-772.

On July 7, 1989, Midland-Orgulf filed its notice of appeal in the district court and this appeal ensued. In its appeal to the United States Court of Appeals for the Fifth Circuit, Midland-Orgulf raised six issues for review. These included: (1) the unfounded assertion that Midland should not have been held liable for the loss because the M/V ROBERT N. STOUT had been bareboat chartered to Orgulf, a fact which Midland had failed to plead and prove in the district court (notably, Midland recidivistically alleges on page 2 of its Petition for a Writ of Certiorari that the vessel "was bareboat hartered [sic]

to Orgulf Transport Company"); (2) the unfounded assertion that Midland-Orgulf owed no duty to avoid colliding with the mooring structures because the structures were obstructions to navigation under the Rivers and Harbors Act, 33 U.S.C. § 403, an affirmative defense Midland-Orgulf neither pleaded in its answer nor in the pretrial order, and one for which it introduced no evidence at trial; (3) the erroneous argument that the district court abused its discretion in awarding prejudgment interest because there was a genuine dispute as to liability, an argument devoid of any substance in light of the fact that this rule applies only in a mutual fault setting, and because Pillsbury had not yet effected repairs, an argument founded upon jurisprudence from the Eighth and Ninth Circuits, which was readily distinguishable from established Fifth Circuit jurisprudence, which Midland-Orgulf did not bother to cite nor to distinguish, and for which no reasonable argument was advanced for its modification or reversal; (4) the argument that Pillsbury should not have been awarded the expenses it incurred in the preliminary replacement effort because these expenses were litigation expenses, but nonetheless failing to cite any evidence in the record that would controvert the district court's finding that these expenses constituted engineering expenses; (5) the farcical argument that the district court erred in applying a straight-line depreciation formula to reduce the replacement costs of the structures – a method of measurement long sanctioned by the Fifth Circuit – rather than an antiquated nineteenth century marine insurance doctrine, the so-called doctrine of thirding, which had long since been repudiated and was

patently inapplicable; and (6) perhaps their most frivolous complaint, that the district court abused its discretion in denying Midland-Orgulf leave to deposit the amounts due and owing under the judgment into the registry of the Court, an argument in which they not only failed to support with any elucidation of factual circumstances that would demonstrate an abuse of discretion, but which, even if true, would not have afforded them any relief since Midland-Orgulf had tendered full payment of the judgment to the Respondents prior to the appeal. Opinion of the Appellate Court, A. 2-3, 904 F.2d 317, 318. Not surprisingly, on July 2, 1990, the Court of Appeals affirmed the opinion of the district court. And, moreover, the Court of Appeals assessed Midland-Orgulf attorneys' fees and double costs for a frivolous appeal under Rule 38 of the Federal Rules of Appellate Procedure. *Id.*, A. 3-4, 904 F.2d 317, 318.

SUMMARY OF THE ARGUMENT

I. **THE COURT SHOULD NOT GRANT CERTIORARI BECAUSE THERE IS NO SQUARE CONFLICT AMONG THE COURTS OF APPEALS CONCERNING THE PROPRIETY OF AWARDING PREJUDGMENT INTEREST UNDER THE GENERAL MARITIME LAW ON THE REPLACEMENT COST OF DAMAGED PROPERTY FROM THE DATE OF THE CASUALTY WHEN THE DAMAGES AWARDED DO NOT INCLUDE RECOVERY FOR LOSS OF USE, AND BECAUSE THE ISSUE OF THE PROPRIETY OF AWARDING PREJUDGMENT INTEREST UNDER SUCH CIRCUMSTANCES FROM THE DATE OF THE CASUALTY RATHER THAN THE DATE OF THE EXPENDITURE FOR REPAIRS IS A NARROW AND MINUTE ISSUE.**

The narrow question presented for review by the Petition for Certiorari is whether the district court

properly awarded Respondents prejudgment interest under the general maritime law on the replacement costs of its damaged property from the date of the accident rather than from the date of expenditure for repairs. Although Midland-Orgulf assert as a basis for review that the question presents a conflict among the Courts of Appeals, it is not altogether clear that a real conflict indeed exists. On the one hand, the First, Second, Fifth, Sixth, Seventh and Eleventh Circuits hold that the district court may in its discretion award prejudgment interest on the replacement cost of damaged property from the date of the casualty when the damages awarded do not include recovery for loss of use, irrespective of whether the plaintiff has effectuated repairs. Contrary to Midland-Orgulf's suggestion, the Ninth Circuit embraces this rule. The Eighth Circuit, on the other hand, appears to hold that prejudgment interest should generally be awarded from the date of expenditure for repairs. Nonetheless, the Eighth Circuit has not yet explicitly addressed the issue of whether this rule should yield when the plaintiff is not awarded damages for loss of use. Therefore, the issue does not present a square conflict among the Courts of Appeals, and, consequently, the petition does not afford a sound basis for granting certiorari.

Although the rule followed by the Eighth Circuit appears to differ from the formulation embraced by the other Circuits, the conflict is tolerable because its differences, if any, are exceedingly narrow and concerns a minute legal issue. This is so because all Circuits concur that prejudgment interest should be awarded under the general maritime law on the money expended in repairing or replacing damaged property as an element of

compensation and not as a penalty. Any conflict among the circuits thus concerns only the question of when prejudgment interest should commence – from the date of the casualty or from the date of expenditure for repairs. And, moreover, any difference in the approach embraced by the various Circuits in addressing this issue is further narrowed by the fact that all circuits afford the district court wide latitude in determining whether prejudgment interest is appropriate, the rate at which interest should apply, and the date from which interest should commence. Because the differences among the Circuits on the question are exceedingly narrow, any such conflict on this question is tolerable and does not merit the attention of the Court.

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY EXERCISED ITS DISCRETION UNDER RULE 38 OF THE FEDERAL RULES OF APPELLATE PROCEDURE IN ASSESSING MIDLAND-ORGULF ATTORNEYS' FEES AND DOUBLE COSTS FOR FRIVOLOUS APPEAL.

As this Court has recently affirmed, Rule 38 of the Federal Rules of Appellate Procedure affords a Court of Appeals plenary discretion to assess "just damages" in order to penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and added expense of defending the district court's judgment. Although Midland-Orgulf disingenuously portray its appeal as solely relating to the propriety of the district court's award of prejudgment interest, the issues actually raised for review by Midland-Orgulf provided

the Fifth Circuit with an ample basis for assessing Midland-Orgulf damages under Rule 38. Thus, the Fifth Circuit explicitly determined that "appellants [Midland-Orgulf] pressed claims that were dependent upon material facts that they failed to plead and prove below, . . . appellants argued positions directly contrary to existing law without addressing and urging a change in the existing law, and . . . appellants complained about district court actions for which they sought no actual remedy." Opinion of the Appellate Court, A. 3, 904 F.2d 317, 318. Because Midland-Orgulf do not, indeed cannot, adduce any circumstances which would evidence an abuse of discretion by the appellate court, the question presented does not warrant review by this Court.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI BECAUSE THERE IS NO SQUARE CONFLICT AMONG THE COURTS OF APPEALS CONCERNING THE PROPRIETY OF AWARDING PREJUDGMENT INTEREST UNDER THE GENERAL MARITIME LAW ON THE REPLACEMENT COST OF DAMAGED PROPERTY FROM THE DATE OF THE CASUALTY WHEN THE DAMAGES AWARDED DO NOT INCLUDE RECOVERY FOR LOSS OF USE, AND BECAUSE THE ISSUE OF THE PROPRIETY OF AWARDING PREJUDGMENT INTEREST FROM THE DATE OF THE CASUALTY RATHER THAN THE DATE OF EXPENDITURE FOR REPAIRS IS A NARROW AND MINUTE ISSUE.

Midland-Orgulf's Petition for a Writ of Certiorari presents a singular issue for review: whether a district court may properly award an injured party prejudgment interest under the general maritime law on the estimated replacement costs of damaged property from the date of the casualty rather than the date of expenditure for repairs when the damages awarded do not include recovery for loss of use. Thus understood, the question presented does not concern a "sufficiently crystallized" conflict among Courts of Appeals to warrant certiorari. *Cf. Beaulieu v. United States*, ___ U.S. ___, 110 S.Ct. 3302, 111 L.Ed.2d 810 (1990) (White, J., dissenting from the denial of certiorari) (certiorari should be granted where the "conflicts among courts of appeals [is] sufficiently crystallized . . . . ").

The First, Second, Fifth, Sixth, Seventh and Eleventh Circuits hold that the district court may in its discretion award prejudgment interest on the replacement cost of damaged property from the date of casualty when the

damages awarded do not include recovery for loss of use, irrespective of whether the plaintiff has effectuated repairs. *Phillips Petroleum Co. v. Stokes Oil Co., Inc.*, 863 F.2d 1250, 1258 (6th Cir. 1988); *Marathon Pipe Line Co., Inc. v. M/V Sea Level II*, 806 F.2d 585, 593 (5th Cir. 1986), *reh'g denied*, 811 F.2d 602 (5th Cir. 1987); *Ryan-Walsh Stevedoring Co., Inc. v. James Marine Serv., Inc.*, 792 F.2d 489, 492-493 (5th Cir. 1986); *City of Boston v. S.S. Texaco Texas*, 773 F.2d 1396, 1401 (1st Cir. 1985); *United States v. Peavey Barge Line*, 748 F.2d 395, 402 (7th Cir. 1984); *Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813, 822-823 (11th Cir. 1984), *reh'g denied*, 738 F.2d 451 (11th Cir. 1984); *Independent Bulk Trans., Inc. v. The Vessel "Morania Abaco,"* 676 F.2d 23, 25-26 (2d Cir. 1982); *Bunge Corp. v. American Commercial Barge Line Co.*, 630 F.2d 1236, 1242 (7th Cir. 1980); *Mobil Oil Corp. v. Tug Pensacola*, 472 F.2d 1175, 1176 (5th Cir. 1973); *The Tanker Hygrade No. 24, Inc. v. The Tug Dynamic*, 233 F.2d 444, 447-448 (2d Cir. 1956).[1] Contrary to Midland-Orgulf's suggestion, the Ninth Circuit appears to largely embrace this rule. While the Ninth Circuit suggested in *Stevens v. F/V Bonnie Doon*, 655 F.2d 206,

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[1] Admittedly, the approach of the Fifth and Eleventh Circuits does diverge from the approach of the First, Second, Sixth and Seventh Circuits in one minor respect – the Fifth and Eleventh Circuits hold that prejudgment interest should generally commence from the date of the casualty rather than the date of expenditure for repairs even when the damages awarded include recovery for loss of use. *See Ryan-Walsh*, 792 F.2d at 492-493; *Miller Industries*, 733 F.2d at 822-823. This discrepancy is of no moment, however, as Midland-Orgulf's Petition for a Writ of Certiorari does not concern this issue because the district court did not award Respondents damages for loss of use.

209-210 (9th Cir. 1981) (hereinafter referred to as *"F/V Bonnie Doon I"*), that prejudgment interest should only be awarded on money expended for repairs (the court did not indicate when interest on such amounts should commence), the court nevertheless appeared to embrace the majority view in its subsequent decision in the matter following remand. In that decision, *Stevens v. F/V Bonnie Doon*, 731 F.2d 1433, 1437 (9th Cir. 1984) (per curiam) (hereinafter referred to as *"F/V Bonnie Doon II"*), the court limited its holding in the *F/V Bonnie Doon I*, excluding prejudgment interest on unperformed repairs, to those circumstances "when the injured party recovers for loss of use." And the court thus stated that prejudgment interest may be awarded "on money not spent" from the date of the casualty provided the costs of repairs are "estimated . . . as of the time of the accident" and the recovery does not include damages for loss of use. *Id.* at 1437-1438.

The Third Circuit, while skirting the issue, has not, however, clearly articulated its approach to this question. *Utility Serv. Corp. v. Hillman Trans. Co.*, 244 F.2d 121, 125 (3rd Cir. 1957) (holding that "[w]here . . . a vessel is damaged but not put out of service interest is generally allowed only from the date of expenditure for repairs, and not from the date of collision.").[2] Conversely, the

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[2] Nevertheless, it bears mention that under this formulation Respondents would undoubtedly have been awarded prejudgment interest from the date of the collision because the district court determined that both the mooring cell and the mooring dolphin were structurally unsound and could no longer perform their intended function. Opinion of the district court, A. 67, 73, 715 F.Supp. 738, 765, 767.

Eighth Circuit appears to embrace a different approach, awarding prejudgment interest from the date of expenditure for repairs. *Federal Barge Lines, Inc. v. Republic Marine, Inc.*, 616 F.2d 372, 373 (8th Cir. 1980).[3]

Nevertheless, it is not altogether manifest that there is a square conflict among the Circuits on this question. Indeed, the Eighth Circuit has not squarely addressed the issue of whether prejudgment interest may commence from the date of the casualty when the damages awarded do not include recovery for loss of use. This distinction was aptly articulated by the Sixth Circuit in *Phillips Petroleum* in distinguishing the Ninth Circuit's holding in the *F/V Bonnie Doon I*:

> *Stevens* is distinguishable from this case. There, the court awarded the injured party demurrage [loss of use] and the injured party procured estimates at the time of trial, not at the time of accident. The trial court denied [plaintiff]

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[3] The Fourth and Tenth Circuits are yet to address the issue. District court decisions from both Circuits, however, largely embrace the approach of the First, Second, Fifth, Sixth, Seventh and Eleventh Circuits. Thus, an unpublished district court decision from the Tenth Circuit holds that prejudgment interest on the replacement cost of a damaged marine structure should commence from the date of the casualty rather than the date of expenditure for repairs. *In re Magnolia Marine Trans. Co., Inc.*, No. 84-2038 (D. Kan., December 10, 1986) (available on WESTLAW, Allfeds Library, 1986 WL 15674) (citing *Geotechnical Corp. of Delaware v. Pure Oil Co.*, 214 F.2d 476, 477-478 (5th Cir. 1954)). Further, an early district court decision from the Fourth Circuit, awarding loss of use damages, holds that prejudgment interest should be awarded from the date of expenditure for repairs. *Yachts, Inc. v. The Tug Edward F. Farrington*, 146 F.Supp. 754, 759 (E.D.N.C. 1956).

> demurrage [loss of use] and lost profits. Furthermore, [plaintiff] obtained the repair estimates soon after the accident and the court did not adjust those estimates for inflation.

Phillips Petroleum, 863 F.2d at 1258. Likewise, the Seventh Circuit employed similar reasoning in *Peavey Barge Line* in distinguishing the Ninth Circuit's holding in *F/V Bonnie Doon II*:

> In cases involving collisions between two vessels, the courts have held that prejudgment interest should not be awarded before the injured party pays for repairs if damages include both demurrage costs [loss of use] and repair costs. *Stevens v. F/V Bonnie F. Doon*, 731 F.2d 1433, 1437-38 (9th Cir. 1984) . . . The courts have reasoned that prejudgment interest on unspent money would be inappropriate when the injured party has recovered for loss of use or demurrage. . . . In the present case, the [plaintiff] did not recover loss of use, so prejudgment interest should be awarded from the date of the collision.

Peavey Barge Line, 748 F.2d at 402 (citation omitted). And, moreover, the Ninth Circuit expressed a similar view in *F/V Bonnie Doon II* in explaining its holding in *F/V Bonnie I*:

> The holding is consistent with the rule that prejudgment interest on money not spent is inappropriate when the injured party recovers for loss of use, known in admiralty as demurrage. . . . The rationale is that 'to grant both demurrage, which theoretically includes the owner's return on his risk capital, and interest on the owner's outlay for repairs before the outlay is made, is to put the owner in a better position than he would have been but for the collision.'

F/V Bonnie Doon II, 731 F.2d at 1437-1438 (citation omitted). *See also Independent Bulk Trans.*, 676 F.2d at 25-26 (holding that there is no "ironclad rule" as to when prejudgment interest may commence, but that prejudgment interest may properly commence from the date of the casualty so long as "demurrage is not recovered and there is no possibility of double recovery."). As the Eighth Circuit is yet to address this distinction, the question does not present a real conflict among the Courts of Appeals. *Cf. Kerr-McGee Chemical Corp. v. Illinois*, 459 U.S. 1049, 1050, 103 S.Ct. 469, 74 L.Ed.2d 618 (1982) (Blackmun, J., respecting the denial of the Petition for Writ of Certiorari).

Although the rule followed by the Eighth Circuit appears to differ from the formulation embraced by the majority of the Circuits, the conflict is tolerable because its differences, if any, are exceedingly narrow, and the issue concerns a minute question. Although Midland-Orgulf spuriously maintain that the issue warrants certiorari because "the issue of prejudgment interest arises in nearly every admiralty case," Petitioners' Petition for a Writ of Certiorari at 4-5, the Courts of Appeals nonetheless uniformly concur on the principles informing the award of prejudgment interest under the general maritime law. Thus, the Courts of Appeals, as well as this Court, have long held that prejudgment interest should be awarded under the general maritime law on the costs of repairing or replacing property as an element of compensation and not as a penalty. *See, e.g., The Umbria*, 166 U.S. 404, 421, 17 S.Ct. 610, 617, 41 L.Ed. 1053 (1897); *Phillips Petroleum*, 863 F.2d at 1258 (citation omitted); *City of Boston*, 773 F.2d at 1401; *Miller Indus.*, 733 F.2d at 823;

Bunge Corp., 630 F.2d at 1242 (citations omitted); *Federal Barge Lines*, 616 F.2d at 373 (citations omitted); *Norfolk Shipbuilding & Drydock Corp. v. M/Y LaBelle Simone*, 537 F.2d 1201, 1204 (4th Cir. 1976) (citations omitted); *Gulf Oil Corp. v. Panama Canal Co.*, 481 F.2d 561, 570 (5th Cir. 1973); *Utility Service*, 244 F.2d at 125; *The President Madison*, 91 F.2d 835, 846 (9th Cir. 1937).

The singular conflict among the Courts of Appeals thus relates solely to the question of when prejudgment interest should commence – from the date of the casualty or from the date of expenditure for repairs. And, moreover, any difference in the approach embraced by the various courts of appeals in addressing this minute issue is further narrowed by the fact that all circuits afford the district court wide latitude in determining whether prejudgment interest is appropriate, the rate at which interest should apply, and the date from which interest should commence. Thus, it is uniformly affirmed that the district court may in its discretion deny the award of prejudgment interest where peculiar circumstances would make such an award inequitable such as improper delay in the resolution of the action, a genuine dispute over a good faith claim in a mutual fault setting, or where the award is substantially less than the amount claimed by the plaintiff. *See, e.g., Reeled Tubing, Inc. v. M/V Chad G*, 794 F.2d 1027, 1028 (5th Cir. 1986) (citations omitted); *Peavey Barge Line*, 748 F.2d at 402 (citation omitted); *Mid-America Transp. Co., Inc. v. Rose Barge Line, Inc.*, 477 F.2d 914, 916 (8th Cir. 1973); *The Wright*, 109 F.2d 699, 702 (2d Cir. 1940). Because the differences among the Courts of Appeals, if

any, are exceedingly narrow, any conflict among the Circuits on this question is tolerable and does not merit the attention of the Court.

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY EXERCISED ITS DISCRETION UNDER RULE 38 OF THE FEDERAL RULES OF APPELLATE PROCEDURE IN ASSESSING MIDLAND-ORGULF ATTORNEYS' FEES AND DOUBLE COSTS FOR A FRIVOLOUS APPEAL.

There is no better measure of the abject frivolity of this appeal than the manner in which Midland-Orgulf formulate this issue for review:

> 2. Is it an abuse of discretion for an appellate court to impose Rule 38, Federal Rules of Appellate Procedure attorney's fees and double costs upon an appellant who challenges an award of pre-judgment interest by urging several distinct and recognized theories on appeal, including that set forth in the first question presented?

Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at p. i. This statement constitutes a patent misrepresentation of their appeal. In fact, Midland-Orgulf raised six issues in their appeal, which were largely punctuated by overt misrepresentations of the law and the record. Notably, in urging that the district court abused its discretion in awarding prejudgment interest from the date of the casualty, Midland-Orgulf omitted citation to Fifth Circuit jurisprudence and cited only Eighth and Ninth Circuit jurisprudence in support of its argument. Midland-Orgulf did not deign to offer a reasonable argument in support

of the modification or reversal of controlling precedent. Only after its misrepresentations were exposed by Respondents did Midland-Orgulf feebly advance any such argument. Not surprisingly, the Fifth Circuit concluded that the appeal was frivolous and that sanctions under Rule 38 of the Federal Rules of Appellate Procedure were warranted:

> The present case merits sanctions because appellants pressed claims that were dependent upon material facts that they failed to plead and prove below, because appellants argued positions directly contrary to existing law without addressing and urging a change in the existing law, and because appellants complained about district court actions for which they sought no actual remedy. We conclude that this was a frivolous appeal.

Opinion of the Appellate Court, A. 3, 904 F.2d 317, 318.

Rule 38 of the Federal Rules of Appellate Procedure affirms:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Fed. R. App. P. 38. This Court has afforded this rule a literal construction:

> Rule 38 affords a Court of Appeals *plenary discretion* to assess 'just damages' in order to penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and added expense of defending the district court's judgment.

Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 107 S.Ct. 967, 970, 94 L.Ed.2d 1 (1987). Measured by this standard, it is

manifest that the Fifth Circuit properly exercised its discretion under Rule 38 in assessing Midland-Orgulf attorneys' fees and double costs for frivolous appeal. Thus, the issue presented does not afford a sound basis for certiorari.

CONCLUSION

The questions presented for review do not afford an appropriate basis for certiorari. Therefore, it is respectfully suggested that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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